Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-254

In the Matter of

Limitations on Commercial Time on
Television Broadcast Stations

NOTICE OF INQUIRY

Adopted: September 23, 1993; Released: October 7, 1993

By the Commission: Chairman Quello and Commissioner Barrett issuing separate statements.

Comments due: November 29, 1993
Reply comments due: December 14, 1993

1. The Commission, on its own motion, is initiating this proceeding to evaluate the commercial programming practices of television broadcast stations. Specifically, we seek comment on whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations.

BACKGROUND

2. Prior to 1984, the Commission had a longstanding policy precluding or discouraging television stations from devoting excessive time to commercial matter.[1] The Commission based this policy on the perception that excessive commercialization "subordinate|d| programming in the interest of the public to programming in the interest of its salability."[2] During this period, licensees were required to maintain detailed logs of their programming, partially to substantiate claims that they were in compliance with this policy. Moreover, the Commission frequently had to determine whether a particular program was a commercial, in order to determine whether it had been properly logged by the licensee.[3] Then, in 1984, after having deregulated commercial time for radio stations, the Commission similarly altered the manner by which it regulated commercial time for television stations.[4] Analyzing the effects of its commercial guidelines, the Commission determined that market forces, rather than Commission rules, were the decisive factor in determining the levels of commercialization for radio and television stations. The Commission therefore abolished the guidelines, concluding that competition would continue to regulate commercial excesses. Notably, the Commission retained its concern that programming in the public interest not become subordinated to programming in the interest of advertisers.[5] Indeed, the Commission stated that if the market were to fail to regulate commercial excesses, then it would be obligated to reconsider that aspect of deregulation.[6]

3. Upon the deregulation of commercial time in 1984, no television station had a programming format that consisted predominantly of sales presentations or program length commercials ("home shopping").[7] A small number of such stations had developed by 1987, when the Commission, stating that it had not contemplated this development, nevertheless found that the format was not contrary to the public interest.[8] However, the Commission at the same time noted that future developments could require it to reexamine that conclusion.[9]

4. In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[10] Section 4(g) of the 1992 Cable Act added a new Section 614(g) to the Communications Act of 1934, as amended, 47 U.S.C. Sec. 534(g), which required the Commission to determine, regardless of prior proceedings, whether stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity.

5. Congress incorporated Section 4(g) with the general rules concerning the mandatory cable carriage ("must-carry") of commercial television stations.[11] That section of the 1992 Cable Act directed the Commission to consider three specific factors in making its public interest determination: (1) the viewing of home shopping stations; (2) the level of

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[1] *See, e.g., En Banc Programming Inquiry*, 44 FCC 2203 (1960).

[2] *Id.* at 149.

[3] *See, e.g., Jimmy Lee Swaggart*, 29 RR 2d 400 (1974) (promotions of religious tours, books, records, and tapes must be classified and logged as commercial programming); *KISD, Inc.*, 22 FCC 2d 833 (1970) (when a record is played in conjunction with an advertisement for its sale, the duration of the play of the record must be computed as part of the commercial message); and *KCOP-TV, Inc.*, 24 FCC 2d 149 (1970) (when the commercial and noncommercial portions of a program are sufficiently intermixed, the entire program must be logged as commercial).

[4] *Report and Order* in MM Docket No. 83-670 (*Television Deregulation*), 98 FCC 2d 1076 at 1101-1105 (1984), *recon. denied*, 104 FCC 2d 357 (1986), *aff'd in part and remanded in part sub. nom Action for Children's Television v. F.C.C.*, 821 F.2d 741 (D.C. Cir. 1987). The Commission had already deregulated radio in the same manner. *Report and Order* in BC Docket No. 79-219 (*Radio Deregulation*), 84 FCC 2d 968 at 1007-08 (1981), *recon. denied*, 87 FCC 2d 797 (1981), *aff'd in part, reversed in part sub nom. Office of Communication of the United Church of Christ v F.C.C.*, 707 F.2d 1413 (D.C. Cir. 1983).

[5] *Television Deregulation* at 1105.

[6] *Radio Deregulation* at 1007-08.

[7] Our use of the term "home shopping" encompasses both sales presentations and program length commercials.

[8] *Family Media, Inc.*, 2 FCC Rcd 2540 (1987).

[9] *Id.* at 2542. As of December 22, 1992, Home Shopping Network, Inc., the major distributor of broadcast home shopping programming, had affiliation agreements with 105 television stations. These stations comprise less than 10% of the total number of commercial television stations currently licensed by the Commission.

[10] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[11] The must-carry rules are codified in Section 4 of the 1992 Cable Act, 47 U.S.C. 534. Section 4(g) required the Commission to qualify home shopping stations as local commercial television stations for the purposes of must-carry if it found that they were serving the public interest. If the Commission found that one or more such stations were not serving the public interest, however, then the Act required that the Commission provide them with reasonable time to provide different programming.

competing demands for the spectrum allocated to such stations; and (3) the role of such stations in providing competition to nonbroadcast services offering similar programming. Based on our review of the record in that proceeding, we found that home shopping stations have been serving the public interest and are therefore qualified for must-carry status.[12]

DISCUSSION

6. The public interest requires that we periodically reassess our notion of that term in light of changing circumstances. A policy that serves the needs of the public at one time may become anachronistic or burdensome at a later time.[13] Section 4(g) of the 1992 Cable Act directed the Commission to evaluate the public interest status of home shopping stations based on three specified criteria and in relation to the must-carry rules. However, congressional debates on the 1992 Cable Act also reflected a more generalized concern with the issue of commercialism in broadcasting. Thus, we are initiating this inquiry to determine whether the public interest would be served by reestablishing limits on the amount of commercial matter that a television station can broadcast.

7. In analyzing this matter, we invite commenters to address whether and in what specific manner an excess of commercial programming disserves the public. Should the Commission reexamine the basic assumptions of the 1984 *Deregulation Order?* Specifically, should some measure besides public acceptance be used to define an "excess" of commercial programming, and, if so, what should it be? What is the effect on our 1984 conclusions of changes in the number of viewing options? Is there a distinction between "commercialism" as it was defined in the 1984 *Order*, and the various formats used for commercial programming as it exists today?

8. Commenters are also invited to address the form that any such regulation would take. If we find that the adoption of limits is warranted, should we enact a strict rule setting specific limits?[14] Should any commercial limits be based on the amount of commercial programming per hour, thereby precluding the broadcasting of program length commercials, or should they be based on some longer period of time that would allow for infomercials and extended sales presentations? Would licensees have greater flexibility in fulfilling their public interest obligations if we were instead to adopt informal processing guidelines (i.e., we would not grant under delegated authority applications for new stations or for the sale or renewal of existing stations, if the applicants aired or proposed more than a certain level of commercialization)?[15] We also ask commenters to address how we would ensure compliance with any limit on commercialization. For example, should we again require television station licensees to maintain logs of their commercial programming, or would certification of compliance be sufficient? Finally, we request that commenters address the First Amendment implications of any proposed limitations on commercial programming.[16]

Procedural Matters

9. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **November 29, 1993** and reply comments on or before **December 14, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (room 239) at the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

10. For further information concerning this *Notice of Inquiry*, please contact Paul R. Gordon, (202) 632-6357, Mass Media Bureau, Video Services Division, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[12] *Report and Order* in MM Docket No. 93-8 (*Home Shopping Stations*), 8 FCC Rcd 5321 (1993), *petition for reconsideration pending*.

[13] *Compare Mayflower Broadcasting Corp.*, 8 FCC 333 (1941) (broadcast editorials held to violate the public interest) with *Opinion on Editorializing by Broadcasters*, 13 FCC 1246 (1949) (broadcast editorials held not to violate the public interest).

[14] Only with regard to children's programming do we now impose such limits. 47 C.F.R. Sec. 73.670.

[15] Such guidelines existed prior to our 1984 television deregulation decision. *Amendments to Delegations of Authority*, 43 FCC 2d 638 (1973).

[16] In that regard, we note the Supreme Court's recent admonition that government regulations not "place too much importance on the distinction between commercial and noncommercial speech." *City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200, slip op. at 14 (U.S. March 24, 1993).

Separate Statement
of
Chairman James H. Quello

In the Matter of Limitations on Commercial Time of Television Broadcast Stations.

The 1992 Cable Act directed the Commission to determine whether television stations that are "predominantly utilized for the transmission of sales presentations or program length commercials" serve the public interest and therefore qualify for "must carry" status. Last June, the Commission found that such stations do serve the public interest under the analysis suggested by the Cable Act.

At that time, however, I indicated that it would be appropriate for the Commission to initiate a more general reexamination of the issue of commercialism as it relates to the public interest. This *Notice of Inquiry* is the result.

I support this *Notice* not because I believe that the Commission should alter its previous conclusions, but because the Communications Act assumes that the FCC will continue to reevaluate the meaning of the phrase "public interest, convenience and necessity." In particular, the Commission must adjust its interpretation of the statute to account for changes in the media environment and in technology.

The public interest standard of the Communications Act is the basic statutory charter under which broadcasters operate. But while the overall requirement is a constant, its meaning changes over time to account for the evolution of the mass media, consumer needs and audience expectations. As I noted in a separate statement in the home shopping decision, the "public interest" may best be understood by gaining some historical perspective. In view of this new *Inquiry*, I believe some of that history bears reviewing.

When Congress enacted the Radio Act of 1927, it borrowed the expression "public interest, convenience or necessity" from the field of railroad regulation but did not independently define the term.1 The Communications Act of 1934, which superseded the Radio Act and created the FCC, continued to leave the term "public interest" undefined.2

Congress purposefully left the regulatory standard open, with the details to be filled in by the FCC over time. This had much to do with the fact that radio was a new and complicated technology. The FCC's broad powers were based on the assumption that "Congress could neither foresee nor easily comprehend . . . the highly complex and rapidly expanding nature of communications technology."3 The Supreme Court affirmed in *FCC v. Pottsville Broadcasting Co.*, that the public interest standard is "as concrete as the complicated factors for judgment in such a field of delegated authority permit," and noted that the approach is "a supple instrument for the exercise of discretion."4

The public interest is not just a flexible standard; it is expressly forward-looking. For example, in 1983 Congress added a new section to the Act establishing "the policy of the United States to encourage the provision of new technologies and services to the public."5 The Supreme Court similarly has recognized that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."6

Consequently, I believe the Act directs the FCC to gauge the public interest by looking to the future, not the past. It simply is impossible to define the public interest merely by examining what it may have meant in 1929, or even 1969. A quick survey of past decisions underscores this point.

The Commission has revised its substantive public interest requirements over time in response to changing conditions. In 1941, the Commission decided that broadcast editorials violated the public interest, only to reconsider that policy eight years later.7 Similarly, in 1945 the Commission withheld renewal of a radio station license until the station agreed to sell time for paid editorials to the United Auto Workers.8 Since then, however, the Commission determined that licensees cannot be forced to sell time to a particular group. This more current view of the public interest was upheld by the Supreme Court.9

Even when the basic policies do not change, the Commission has modified their application.

This has occurred because our understanding of the public interest undoubtedly has evolved along with society. Audience needs and expectations are not the same today as they were in the early days of radio.

Certainly audience sensibilities have changed. For example, in late 1937, hundreds of radio listeners complained about an episode of NBC's "Charlie McCarthy" program in which Charlie McCarthy and Mae West portrayed the title characters in a sketch entitled "Adam and Eve." The Commission investigated the matter and found nothing in the script objectionable. But some of Mae West's inflections were considered "suggestive." On this basis, the Commission sent NBC and its affiliates letters concluding that the program was "vulgar , immoral or of such other character as may be offensive to the great mass of right-thinking, clean-minded American citizens."10

Of course, the Commission continues to actively enforce the indecency rules as part of the basic statutory requirement for broadcasters. I have been, and continue to be, a vocal supporter of the rules' enforcement in appropriate cases. But I think it may be just a bit unrealistic to use the same measure for "offensiveness" in 1993 that the Commission employed over half a century ago. The public interest *requirement* may be the same, but its *application* is quite different as conditions change.

The same is true for some of the Commission's other programming requirements. For example, eight Georgia radio stations were given only temporary renewals in 1958 because the stations were devoted to a "news and music" format. The Commission informed the stations by letter that full-term license renewals had been denied because their program schedules consisted "almost entirely of recorded music."11 I doubt that the public interest would be served if the Commission imposed this rigid view on the radio industry today.

Similar examples abound. The Commission has suggested in the past that the public interest was not served when stations scheduled commercials within news programs, or when they aired "too many" soap operas.12 In 1937 the Commission questioned the license renewal of a station that produced a program called "The Friendly Thinker" that offered advice on business affairs, love and marriage. Although the show's host was not an astrologer and disclaimed any supernatural powers, the Commission noted that such advice programs were objectionable because they tended to mislead the public. The Commission renewed the license only after the station discontinued the program.13 If such a view of the public interest prevailed today, many, if not most, licenses would be at risk.

Our approach to broadcast advertising also has evolved. In 1936, the Commission ordered a renewal hearing for a licensee that had aired commercials that made "exaggerated claims" for a weight loss product.14 Just imagine the number of minor celebrities that would have to find honest work if the Commission mounted a new crusade to ensure the effectiveness of diets.

On a more basic level, the notion of what may be considered "excessive" advertising has changed over time. In 1930, William S. Hedges, then president of the National Association of Broadcasters, testified before Congress regarding the quantitative advertising limits that the NAB then enforced. He said that at his station, "no more than one minute out of the 30 minutes is devoted to advertising sponsorship. In other words, the radio listener gets 29 minutes of corking good entertainment, and all he has to do is to learn the name of the organization that has brought to him this fine program."15

Not only does today's audience expect to give up more than a minute in exchange for a corking good sitcom, the Commission concluded that those viewers are the best judge of how much advertising is too much. The Commission found in 1984 that the number of alternatives available to viewers is the best protection against over-commercialization. The tyranny of the remote control provides an adequate check on broadcast stations that must increasingly compete for viewers.16

Such an approach was unthinkable to the Federal Radio Commission. In fact, in 1928 it expressly rejected the argument that listeners could shift away from "irksome" broadcasts in a decision placing four stations on probation. The FRC noted that the listeners' "only alternative, which is not to tune in on the station, is not satisfactory, particularly when in a city such as Erie only the local stations can be received during a large part of the year. When a station is

[devoted to excessive advertising] the entire listening public is deprived of the use of a station for a service in the public interest."[17]

It is beyond dispute that the current Commission must consider a very different media environment than did the FRC. The number of television stations increased by 50 percent between 1975 and 1992; more than half of all households receive ten or more over-the-air TV signals; over 90 percent of all households are passed by cable and over 60 percent subscribe; the average cable subscriber receives more than 30 channels; other competitive video providers are increasingly available, and national DBS service is anticipated next year.[18] The Commission's recent decision to curtail the financial interest and syndication rules recognizes that broadcast television now faces stiff competition from other media. In just a few years, the broadcast networks have experienced sharp declines in their audience shares, from over 90 percent in the mid-1980s to less than 60 percent today.[19]

Given these developments, I think that the Commission's interest in preventing over-commercialization is far different today than we may have considered necessary in the past.[20] While I think that it is entirely appropriate to raise the issue of commercialism and the public interest, we are obligated by the structure and purpose of the Communications Act to look to the future, and not to simply parrot homilies from the past.

I intend to keep these principles in mind as this *Inquiry* progresses.

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[1]The Radio Act directed the Federal Radio Commission to perform its various tasks, including classifying radio stations, describing the type of service to be provided, assigning frequencies, making rules to prevent interference, establishing the power and location of transmitters and establishing coverage areas in a way that maximized the public good. Of course, this begged the essential question of what constitutes "the public good." The FRC took the position that the Supreme Court eventually would define the public interest case by case. Nevertheless, it outlined the primary attributes of the public interest in its policy statements and licensing decisions.

[2]*Office of Communication of the United Church of Christ v. FCC*, No. 81-1032, slip op. at 27 (D.C. Cir., May 10, 1983) ("the [Communications] Act provides virtually no specifics as to the nature of those public obligations inherent in the public interest standard"). Despite the lack of a categorical definition of the public interest, various provisions of the Act operationally define at least part of what Congress intended. For example, the Act directs the FCC to provide, to the extent possible, rapid and efficient communication service, adequate facilities at reasonable charges, provision for national defense and safety of lives and property, and a fair, efficient and equitable distribution of radio service to each of the states and communities.

[3]*National Ass'n. of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976).

[4]309 U.S. 134, 138 (1940).

[5]47 U.S.C. § 157.

[6]*CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

[7]*Compare Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941) with *Opinion on Editorializing by Broadcasters*, 13 F.C.C. 1246 (1949). *See also Syracuse Peace Council*, 2 FCC Rcd. 5043 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990) (Fairness Doctrine does not serve the public interest); *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984) (ban on editorials by public broadcast stations is unconstitutional).

[8]*E.g., United Broadcasting Co.*, 10 F.C.C. 515 (1945).

[9]*CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973) (broadcasters may not be compelled to provide a generalized right of access to discuss controversial issues).

[10]*See* "FCC Issues Rebuke for Mae West Skit," *Broadcasting*, January 15, 1938 at 13.

[11]*See* "Closed Circuit," *Broadcasting*, March 31, 1958 at 5; "Closed Circuit," *Broadcasting*, July 7, 1958 at 10.

[12] *See generally Public Service Responsibility of Broadcast Licensees* (March 7, 1946) (the "*Blue Book*").

[13] *Radio Broadcasting Corp.*, 4 F.C.C. 125 (1937).

[14] *Don Lee Broadcasting System*, 2 F.C.C. 642 (1936).

[15] Senate Committee on Interstate Commerce, Hearings on S. 6, 71st Cong., 2d Sess. (1930). William S. Paley of CBS similarly testified that seven-tenths of one percent of the network's air time was devoted to advertising. *Id.*

[16] *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076, 1101-05 (1984), *aff'd in relevant part sub nom. Action for Childrens Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

[17] FRC Decision on Stations WRAK, WABF, WBRE and WMBS, discussed in the *Blue Book* at p. 41.

[18] *See Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, FCC 92-209 (released June 12, 1992).

[19] *Evaluation of the Syndication and Financial Interest Rules*, 58 Fed. Reg. 28927 (May 18, 1993).

[20] It is important to acknowledge that "the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 122. Additionally, many of the Commission's prior policies on commercialism predated the extension of First Amendment protection to commercial speech. And most recently, the Supreme Court has cautioned that government regulations should not "place too much importance on the distinction between commercial and noncommercial speech." *City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200, Slip op. at 14 (U.S. March 24, 1993). Any evaluation of the constitutional "worth" of speech that is based on the percentage of editorial content compared to advertising material is a very suspect proposition. Newspapers, which receive full First Amendment protection, generally strive for a ratio of about 70 percent advertising to 30 percent editorial content. *See* C. Fink, *Strategic Newspaper Management* 43 (1988).

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Notice of Inquiry Regarding Commercial Limits for Television Broadcast Stations

On July 22, 1993, the Commission determined that home shopping stations satisfied public interest criteria and therefore qualified for must-carry status.[1] In this proceeding, the Commission has adopted a Notice of Inquiry seeking comments on whether it is in the public interest to reestablish limits on the amount of commercial matter broadcast on television stations.

I write separately to underscore the importance of making certain that the Notice does not create one standard for home shopping stations and another for other commercial matter broadcast by television licensees. Home shopping stations must not become the sole focus of the Notice. Instead, we must ascertain the need for establishing guidelines for commercial matter across all broadcast stations.

Along these same lines, I am concerned that we do not make determinations based upon program content only. Considerations premised on such issues raise subjective First Amendment concerns and create an unnecessarily contentious environment.

Over the years, commercial matter on television stations have appeared in a variety of formats. In this docket, I believe the Commission must focus on whether it is necessary to impose any limits on commercial matters for broadcast stations.

[1]Home Shopping Stations, Report and Order in MM Docket No. 93-8, 58 FR 39156 (July 22, 1993).